

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO  
ALBUQUERQUE DIVISION

UNITED STATES OF AMERICA,  
and NEW MEXICO OFFICE OF THE  
NATURAL RESOURCES TRUSTEE,

Plaintiffs,

v.

Civil Action No. 95-0285 MV/LFG

BAYARD MINING CORP.,  
MINING REMEDIAL RECOVERY  
COMPANY, TCI PACIFIC  
COMMUNICATIONS, INC, (formerly  
known as Viacom International Inc.,)

and

CBS OPERATIONS INC. (originally  
known as Viacom International  
Services Inc.  
(Joined Party)

Defendants.

**UNITED STATES' NOTICE OF LODGING OF  
PROPOSED CONSENT DECREE MODIFICATIONS**

The United States hereby notifies the Court that it has lodged with the Clerk of Court a Joint Stipulation to Modify the Consent Decree that was entered by this Court in the above-captioned matter on June 12, 1995 ("Consent Decree" or "Decree") (Doc. No. 20). This Consent Decree pertains to the cleanup of the Cleveland Mill Superfund Site ("Site") near Silver City, New Mexico. Due to changes in the response action required at this Site, the United States hereby requests corresponding modifications be made to the Consent Decree, as described below.

The United States is **not** requesting any action by the Court at this time on the proposed modifications. Given the nature of the proposed modifications, and pursuant to 28 C.F.R. § 50.7 and U.S. Department of Justice policy, the United States is inviting the public to comment on the proposed modifications for a period of thirty (30) days before seeking judicial approval. The public comment period will begin upon publication of a notice in the Federal Register, which we anticipate will occur shortly. Upon expiration of that comment period, the United States will advise the Court of any comments received and of the United States' position as to whether the Court should approve and enter the proposed modifications.

Below, the United States describes the proposed modifications and explains the reasons therefor. The text of the proposed modifications is set forth in the attached Joint Stipulation to Modify the Consent Decree, signed by all parties (attached hereto as Appendix 1). In very general terms, the Consent Decree entered in this matter in 1995 required the Bayard Mining Corp., Mining Remedial Recovery Company, and Viacom International Inc. (n/k/a TCI Pacific Communications, Inc.) (the "Settling Defendants") to perform certain specified response actions at the Site. Since entry of the Consent Decree in 1995, a separate CERCLA removal action, conducted at the Site by the Settling Defendants (together with CBS Operations Inc. ("CBS")) pursuant to EPA's administrative authorities, has obviated the need for the remedial action required by the Consent Decree. Although the Settling Defendants (together with CBS) have performed the work pursuant to these revised terms, the corresponding changes to the Consent Decree have not been made. By this Notice and the attached Stipulation, the parties seek to harmonize the Consent Decree with the history of the response actions at the Site. By separate

Stipulation and Agreed Order, filed simultaneously with this Notice, the parties seek to add CBS as a defendant for the reasons cited therein.

**I. Background and Basis for the Requested Modifications**

1. The United States, on behalf of the U.S. Environmental Protection Agency ("EPA"), the U.S. Department of Interior, and the U.S. Department of Agriculture, Forest Service, and the New Mexico Office of the Natural Resources Trustee jointly entered into a Consent Decree with the Defendants Bayard Mining Corporation, Mining Remedial Recovery Company, and Viacom International Inc. (now known as TCI Pacific Communications, Inc.) that was entered as an Order of this Court on June 12, 1995 ("Consent Decree" or "Decree").

2. As described therein, the Consent Decree resolves the alleged liability of Settling Defendants under Sections 106 and 107 of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §§ 9606-07 and Section 7003 of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6903, that were set forth in a Complaint filed contemporaneously with the proposed Consent Decree.

3. Among other things, the original Consent Decree required Settling Defendants to perform certain response actions (the "Work") at the Cleveland Mill Superfund Site near Silver City, New Mexico (the "Site"), as set forth in a Record of Decision ("ROD"), which was executed on September 22, 1993.

4. The Site is a former ore processing area adjacent to an area known as the Cleveland Mine. Approximately 125,000 tons of lead, zinc, and copper ore were produced from the Cleveland Mine during the period from about 1900 until 1919. After this time, the Site was

intermittently leased for mining and grazing. Mining activities steadily declined in this area after 1950, and the Site is currently owned by Mining Remedial Recovery Company and Bayard Mining Corporation.

5. During the years of mining activities, mill "tailings" and "mine waste rock" were disposed of in several areas of the Site. As defined by EPA, the Site included several tailings piles, including approximately 170,000 cubic yards of waste material, as well as areas that were contaminated with metals such as arsenic, beryllium, cadmium, copper, lead, and zinc from the ore processing.

6. In 1993, EPA memorialized its selection of a remedial action to address the contamination at the Site in the ROD for the Site. Specifically, EPA's selected remedial action included the excavation of impacted tailings and sediment, the *off-site reprocessing* of these tailings and sediment, and the *off-site disposal* of any reprocessing residuals that had concentrations in excess of acceptable levels. In the Consent Decree, Settling Defendants committed to perform this remedial Work. However, while implementing the Work pursuant to the Consent Decree, Settling Defendants – with the oversight and assistance of EPA and the New Mexico Environment Department ("NMED") – were unable to locate an acceptable off-site reprocessing and disposal facility, despite significant effort and the requirement to do so set forth in the ROD and in the Consent Decree.

7. During the time spent by Settling Defendants (together with CBS) to identify an off-site facility for the reprocessing and disposal of contaminated materials, conditions at the Site worsened. Specifically, due to early and unusually heavy rains during the Spring of 1997, the

contaminated tailings and sediment began to migrate, causing contamination to spread much faster than anticipated and increasing the potential risk to human health and the environment. See Request for a Time-Critical Removal Action at the Cleveland Mills Superfund Site, Grant County, New Mexico (July 11, 1997) (hereinafter "1997 EPA Action Memorandum") (attached as Appendix 2). As a result, EPA determined that expeditious action was needed to address the source of the contamination, and elected to take a Removal Action using its administrative authority under CERCLA Section 104, 42 U.S.C. § 104, to address the growing risk. Id., at 21.

8. On June 3, 1997, EPA held a public meeting in Silver City at which it proposed an alternative solution that would require the contaminated material to be excavated, treated, and contained *on-site*. See Silver City Daily Press, May 30, 1997 (attached as Appendix 3). Verbal and written public reaction to the announcement was generally positive. See Public Comments on Removal Action, 1997, attached as Appendix 4. On July 11, 1997, EPA, with the concurrence of the NMED, issued the 1997 EPA Action Memorandum, which authorized a time-critical<sup>1</sup> Removal Action to address the Site contamination without identifying an off-site disposal and/or reprocessing facility. Settling Defendants agreed to implement this Removal Action through an EPA Administrative Order on Consent (AOC) that became effective on September 23, 1997 (attached hereto as Appendix 5). See CERCLA §§ 104, 106(a), and 122, 42

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<sup>1</sup> EPA uses the terms "time critical removal action" and "non-time critical removal action" to distinguish between removal actions for which EPA determines that on-site activities must be initiated within a six month period, and removal actions for which a planning period of at least six months exist before on-site activities must be initiated. See EPA's Office of Solid Waste and Emergency Response (OSWER) Directive No. 9318.0-05 (April 13, 1987); National Contingency Plan, 40 CFR § 300.415(n) (2) and (4).

U.S.C. §§ 9604, 9606(a) and 9622. On October 6, 1997, EPA held a further informational meeting in Silver City to advise the public of the initiation of the specified remedial work at the Site. See Meeting Invitation to the Cleveland Mill Superfund Site, Grant County, New Mexico, Open House, October 6, 1997 (attached hereto as Appendix 6).

9. As of September 1999, consistent with the requirements of the AOC and the 1997 EPA Action Memorandum, Settling Defendants (together with CBS) had fully excavated, treated, and contained all the contaminated tailings and sediment at the Site. EPA determined that these requirements were completed in its Final Pollution Report (POLREP) (December 17, 1998), which addressed the completion of the Removal Action, and in its Final Closeout Report, Cleveland Mill Superfund Site, Grant County, New Mexico (June 2000), which addressed the completion of the remedial action (both of which are attached hereto as Appendix 7). The completion of this Work has rendered moot certain of the original requirements of the ROD and the Consent Decree entered in this matter – specifically, those that required off-site reprocessing and disposal of contaminated tailings and sediment. The Removal Action effectively replaced these requirements in the ROD with a revised approach to addressing the contaminated tailings and sediment at the Site in a manner that was more expeditious and thus more environmentally protective than the ROD's requirements and one that still enjoyed community support.

10. Importantly, notwithstanding these changes to the response action undertaken at the Site, Settling Defendants (and CBS) must still perform ongoing operation and maintenance (O&M) of the constructed remedy, including ground water monitoring, consistent with the requirements of the ROD and the Consent Decree. See Consent Decree, at ¶12, and Appendix B

thereto (Statement of Work), at § IV.C. The specific terms of these requirements are set forth in (1) the Cleveland Mill Site Operation and Maintenance Plan (February 24, 2000), and (2) the Removal Action Sampling and Analysis Plan (August 27, 1997), both of which were revised by an April 4, 2001 letter from EPA to Mining Remedial Recovery Company and by a January 3, 2003 letter from EPA to Geochemical Solutions, Settling Defendants' contractor. (These four documents are attached hereto as Appendix 8.)

11. In May of 1999, to reflect the change in the response action performed by Settling Defendants (together with CBS), EPA published an Amended Proposed Plan, recommending that the 1993 ROD remedy be amended to require "no further action," except for the requirements for O&M noted above. This Amended Proposed Plan was made available for public comment and was the subject of a public meeting in Silver City, New Mexico, on June 9, 1999.

12. EPA received a total of eight comments, all pertaining to the remaining O&M component of the amended remedy. These comments were addressed in a Responsiveness Summary that was published as part of the ROD Amendment, formalizing this modification of the Work, which was concurred in by the State of New Mexico and executed by EPA on September 20, 1999. See ROD Amendment, Cleveland Mill Superfund Site (September 1999) (attached hereto as Appendix 9), at 23.

13. Pursuant to Section XXXIII (Modification) of the Consent Decree, the parties now jointly seek to amend the Consent Decree to reflect the change in the Work affected by the Removal Action, the Administrative Order, and the ROD Amendment, and to make the Consent Decree consistent with these proceedings. To do so, the parties have stipulated to proposed

modifications to the Consent Decree, set forth in the attached Joint Stipulation to Modify Consent Decree.

14. By separate stipulation, the parties have agreed, pursuant to Rule 25(c) of the Federal Rules of Civil Procedure, to join CBS as a Settling Defendant in this action. As stated in the separate Stipulation, TCI Pacific Communications, Inc. ("TCI") is the successor to Paramount Communications Inc., which is the successor to one or more entities that owned and operated mining and milling operations on the Site during the relevant time frame. Pursuant to a series of agreements involving the separation of the cable television assets from all other assets owned by Viacom International Inc., effective July 31, 1996, CBS agreed to indemnify TCI for the obligations contained in the Consent Decree. For purposes of this Notice and the attached Stipulation, Settling Defendants and CBS collectively shall be known as "Supplemented Settling Defendants."

## **II. Description of Proposed Modifications**

15. There are essentially four consequences of the proposed Consent Decree modifications set forth in the attached Joint Stipulation to Modify Consent Decree.

16. a. First, the Consent Decree will no longer require Supplemented Settling Defendants to perform the Remedial Design and Remedial Action components of the Work described in Section IV (Work to Be Performed) of the SOW (Appendix B to the Consent Decree), since that work is no longer necessary. The Remedial Design requirements set forth in the Consent Decree's Statement of Work, as well as the Removal Action requirements set forth in the AOC's Statement of Work (the latter of which is Attachment D to the AOC, which



attached hereto as Appendix 5) have already been performed. The Decree will still require Supplemented Settling Defendants to perform all O&M activities described in the Cleveland Mill Site Operation and Maintenance Plan (February 24, 2000) and all the ground water sampling and analysis described in the Removal Action Sampling and Analysis Plan (August 27, 1997), as subsequently revised, with EPA approval. See Appendix 8.

b. Second, the Consent Decree will no longer require Supplemented Settling Defendants to prepare a report documenting the completion of the remedial action since that requirement is mooted, and was effectively replaced, by the requirements set forth in the AOC. See Appendix 5, at ¶ 78. As noted above, EPA has already determined that the Removal Action required by the AOC is complete. See Appendix 7.

c. Third, in light of EPA's Final Closeout Report, which documents EPA's determination that the remediation goals set forth in the ROD and ROD Amendment have been achieved, the proposed modifications will place Supplemented Settling Defendants in the same position that they would have been if EPA had issued a Certificate of Completion of the Remedial Action pursuant to subparagraph 47(b) of the Consent Decree. In particular, the covenants not to sue set forth in Section XXIII will, by virtue of the proposed modifications, take effect upon entry of the proposed modifications. See Consent Decree, at ¶¶ 47, 82.

d. Fourth, given that a significant portion of the cleanup work is now completed, the proposed modifications would reduce the amount of financial security Supplemented Settling Defendants are required to maintain, pending the completion of the Work (including all O&M

activities), from \$6.5 million to \$230,000. See Consent Decree, Section XIV (Assurance of Ability to Complete Work).

Except as specifically provided, all other terms and conditions of the Consent Decree will remain unchanged and in full effect.

### **III. Conclusion**

17. As EPA has explained in the 1997 Action Memorandum and ROD Amendment (Appendices 2 and 9), the revised remedial action undertaken by Supplemented Settling Defendants to date is protective of human health and the environment. The proposed modifications to the Consent Decree will conform the Decree to these revised requirements and, therefore, are fair, reasonable, and in the public interest.

18. Pursuant to Paragraph 110 of the Consent Decree, any material change to the Consent Decree shall become effective only upon approval of this Court. Consistent with 28 C.F.R. § 50.7, however, the United States is not seeking the Court's approval of the proposed modifications until there has been opportunity for public comment. The United States therefore requests that the Court refrain at this time from entering the proposed modifications as an order of this Court. Following the public comment period, the United States will advise the Court as to any comments received during the public comment period and the United States' position regarding entry of the proposed modifications.

Respectfully Submitted,

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